IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNTON SAVAGE	:	CIVIL ACTION
	:	
v.	:	
	:	
ALEX BONAVITACOLA, et al.	:	NO. 03-0016

O'NEILL, J. JUNE 2, 2005

MEMORANDUM

Plaintiff, Thornton Savage, pro se, filed a complaint against defendants, Alex Bonavitacola--President Judge of the Court of the Court of Common Pleas of Philadelphia, Louise Mascilli--Court Administrator, Janet Fasy Dowds--Deputy Court Administrator, and Lynne Abraham--District Attorney, in their individual capacities, alleging a violation of his civil rights under 42 U.S.C. § 1983. On March 9, 2005, I denied without prejudice defendants' motions to dismiss with respect to their statute of limitations defense, granted defendants' motions to dismiss with respect to plaintiff's conspiracy claim, and granted defendants' motion to dismiss all claims against District Attorney Abraham. Savage v. Bonavitacola, No. 03-0016, 2005 WL 568045 (E.D. Pa. March 9, 2005). On March 29, 2005, I denied plaintiff's motion for reconsideration. Savage v. Bonavitacola, No. 03-0016, 2005 WL 730679 (E.D. Pa. March 29, 2005). Before me now is defendants' motion for summary judgment filed by defendants Judge Bonavitacola and Fasy Dowds, plaintiff's response thereto, and plaintiff's "motion for supplemental order for determination under Rule 54(b)."

The facts of this case are discussed in detail in my March 9, 2005 opinion in this case. Savage v. Bonavitacola, No. 03-0016, 2005 WL 568045, *1-3 (E.D. Pa. March 9, 2005).

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) (2004). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions . . . which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). After the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (2004).

I must determine whether any genuine issue of material fact exists. An issue is genuine if the fact finder could reasonably return a verdict in favor of the non-moving party with respect to that issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is material only if the dispute over the facts "might affect the outcome of the suit under the governing law." Id. In making this determination, I must view the facts in the light most favorable to the non-moving party, and the non-moving party is entitled to all reasonable inferences drawn from those facts. Id. However, the nonmoving party may not rest upon the mere allegations or denials of the party's pleading. See Celotex, 477 U.S. at 324. The non-moving party must raise "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion and cannot survive by relying on unsupported assertions, conclusory allegations, mere suspicions. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989). If the evidence for the nonmoving party is merely colorable, or is not significantly probative, summary judgment may

be granted. Anderson, 477 U.S. at 249-50 (citations omitted).

DISCUSSION

Judge Bonavitacola and Fasy Dowds assert in their motion for summary judgment that Savage's Section 1983 action is barred by the two year statute of limitations. Defendants previously argued in their motions to dismiss that Savage's Section 1983 action is barred by the statute of limitations because he failed to file his claim within the two year statute of limitation period provided by 42 Pa. Cons. Stat. Ann. § 5524(2). See Savage v. Bonavitacola, No. 03-0016, 2005 WL 568045, *4 (E.D. Pa. March 9, 2005). I held that defendants' arguments were not properly asserted in a motion to dismiss because it was not clear on the face of Savage's complaint that he did not bring his complaint within the statute of limitations. Id. at *4-5. Therefore, I chose to deny defendants' motions to dismiss without prejudice to the renewal of the statute of limitations defense in a summary judgment motion. Defendants now have renewed their statute of limitations defense in their motion for summary judgment.

A Section 1983 action is subject to the statute of limitations for personal injury actions in the state in which it is filed. Wilson v. Garcia, 471 U.S. 261 (1985). In Pennsylvania, the appropriate limitations period is two years. Pa. Cons. Stat. Ann. § 5524 (2004); Bougher v. Univ. of Pittsburgh, 882 F.2d 74, 78 (3d Cir. 1989). Section 5524's two year limitation period begins to run when the cause of action accrues. S.T. Hudson Eng'rs, Inc. v. Camden Hotel Dev. Assocs., 747 A.2d 931, 934 (Pa. Super. Ct. 2000). An action accrues "when the plaintiff knew or should have known of the injury upon which its action is based." Sameric Corp. of Del., Inc. v. City of Phila., 142 F.3d 582, 599 (3d Cir. 1998); Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1386 (3d Cir. 1994) ("A claim accrues in a federal cause of action as soon as a potential claimant either is aware, or should be aware, of the existence of and source of an

injury.").

Savage asserts that there is a genuine issue of material fact as to when his Section 1983 claim accrued because "he exercised due diligence in attempting to obtain his voir dire and closing argument transcripts during the period of July 1986 to May 15, 2002 [and] [t]hus, he did not become aware of the alleged constitutional injury until May 15, 2002[.]" I disagree. There is no issue of material fact as to when Savage knew or should have known that the transcripts were unavailable. Defendants correctly assert that Savage knew or should have known that the transcripts were unavailable on October 15, 1999, when he filed a motion for reconsideration in connection with the dismissal of his habeas petition, alleging that his counsel had failed to claim that he had been denied due process because he had not been provided with the transcribed notes of testimony. See, e.g., Def. Savage's Mot. for Reconsideration at 6 (October 15, 1999); Savage v. Larkins, No. 98-6257, 1999 WL 744446 (E.D. Pa. Sep 24, 1999). Similarly, Savage knew or should have known that the transcripts were unavailable on July 26, 2000 when he received a letter from the Court Reporter Administration, which listed Judge Bonavitacola and Fasy Dowds in the heading and specifically advised him that the voir dire and closing argument transcripts were not available because the notes had not been transcribed following his trial.[1] See, e.g., Defs' Mot. for Summary Judgment, Ex. C (March 29, 2005); Pl's Affidavit in Support of

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[1]The text of the July 26, 2000 letter is as follows:

Dear Mr. Savage:

I am sorry to inform you that the "Voir Dire" that you requested from us can not [sic] be found. We have the notes, but apparently the judge didn't ask for the "Voir Dire" to be transcribed so that part of the transcripts wasn't taken.

Sorry for the wait and inconvenience.

Court Reporter Administration

Response at 5, ¶ 23 (April 11, 2005). Thus, Savage's Section 1983 claim accrued on October 15, 1999.

Savage had two years from October 15, 1999--or until October 15, 2001--in which to file his Section 1983 complaint. However, Savage did not file his complaint until January 2, 2003--over three years after his claim accrued and a year after his claim expired. Even assuming that Savage's Section 1983 claim did not accrue until July 26, 2000, he had until July 26, 2002 in which to file his complaint under the two year limitation period. Savage did not file his complaint until two and a half years after his claim would have accrued and five months after his claim would have expired.[2] Therefore, Savage's Section 1983 claim is barred by the statute of limitations. Defendants' motion for summary judgment will be granted.[3]

An appropriate order follows.

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[2]Savage does not assert any facts to support an argument for equitable tolling.

[3]Defendants also argue that: (1) Savage's Section 1983 claims cannot be based upon the doctrine of respondeat superior; (2) Judge Bonavitacola and Fasy Dowds, acting in their official capacities, are not "persons" who can be sued under 42 U.S.C. § 1983; and (3) Savage cannot state a claim against Judge Bonavitacola and Fasy Dowds in their individual capacities. However, because Savage's Section 1983 claim is barred by the statute of limitations, I will not address defendants' other arguments.

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ORDER

AND NOW, this 2nd day of June 2005, upon consideration of defendants' motion for summary judgment, plaintiff's response thereto, and for the reasons set forth in the accompanying memorandum, it is ORDERED that defendants' motion for summary judgment is GRANTED. Plaintiff's "motion for supplemental order for determination under Rule 54(b)," is DISMISSED as moot. Judgment is entered in favor of defendants, Alex Bonavitacola, Louise Mascilli, and Janet Fasy Dowds, and against plaintiff, Thornton Savage.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.